IN THE

United States Supreme Court

OCTOBER TERM, 1963

No. 86

UNITED STATES OF AMERICA,
Petitioner,

v.

KENNETH LEROY BEHRENS,
Respondent.

BRIEF FOR RESPONDENT

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at (R. 30-37) 312 F. (2d) 223. An opinion of the District Court in a previous proceeding is reported at 190 F. Supp. 299 (S. D. Ind.).

JURISDICTION

The judgment of the Court of Appeals was entered on December 26, 1962 (R. 38-39). The United States Government filed a Petition for Certiorari on March 7, 1963, and

the same was granted on April 29, 1963 (R. 39, 373 U. S. 902). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED.

Whether the respondent was required to be present when his sentence was finally determined under the provisions of 18 U.S.C. 4208(b).

SUMMARY OF ARGUMENT

This action arose from an order denying respondent relief under 28 U.S.C. §2255. The Court of Appeals for the 7th Circuit reversed the Trial Court upon the grounds that the respondent was not present nor was he represented by counsel at the time his sentence was finally determined under 18 U.S.C. 4208(b). The holding of the Court of Appeals was correct.

A.

A Criminal Defendant Is Entitled To Be Represented by Counsel at Every Stage of the Criminal Proceeding

It is a fundamental concept of American jurisprudence that a criminal Defendant is entitled to be represented by counsel at every stage of the criminal proceeding. This right is guaranteed under the 5th and 6th Amendments of the Constitution. This Court has repeatedly held that a Defendant is entitled to be represented by counsel and failure to provide counsel is a denial of due process. *Johnson v. Zerbst*, 304 U. S. 458 (1938).

The requirement of counsel has been amplified by Rule 44, Federal Rules of Criminal Procedure. Thus, we have each individuals right to counsel secured by the Constitution, Court decisions and Court rules.

B.

A Criminal Defendant Is Entitled To Be Present and Represented by Counsel at the Time Final Sentencing Is Imposed Under Title 18 U.S.C., Section 4208(b)

Under 18 U.S.C., §4208(b), final sentencing of a criminal Defendant is not made until certain reports and recommendations are received by the Trial Judge. At the time this statute is applied the Trial Court is required to impose the maximum sentence under law, then when the studies have been completed the Trial Court is required to fix the final sentence.

In the words of the Trial Judge in the instant case, this is done so "that we should be able to come up with a sane and civil disposition of your case." (R. 16)

The Trial Court recognized that he was not making final disposition of this case when he imposed the mandatory maximum sentence. This Court has held in *Parr v. U.S.*, 351 U. S. 513 (1956), that there was no final determination until there was nothing left to do but execute the sentence.

Rule 43, Federal Rules of Criminal Procedure, requires that a Defendant be present at the time sentence is imposed and Rule 44 gives him the right of counsel.

The right to be present when final sentence is determined is particularly important as this is the only time the Defendant can effectively exercise his right of allocution. It is at this time and only this time that the Trial Judge has any discretion in imposing punishment.

The obvious intent of §4208(b) is ably expressed by the Court of Appeals for the 7th Circuit in its opinion in this case when it held:

"To regard the maximum term of imprisonment 'deemed' to have been imposed by §4208(b) as an actual sentencing of the defendant, even where, as here, the maximum term is expressly written into the judgment order, is, in our considerd judgment, directly contrary to the express intent and purpose of the section. The declared object and purpose of §4208(b) is to enable the Court to obtain such detailed information as may aid it in determining the actual sentence to be imposed. It is for this purpose that §4208(b) authorizes and provides for a limited postponement of definitive action until the study is made and the reports and recommendations received. The action to be taken under §4208(b) is unlike a reduction of sentence made under Rule 35, Federal Rules of Criminal Procedure. Rule 35 admits of a discretionary reduction of a sentence already definitely imposed and Rule 43 properly dispenses with the defendant's presence for such purpose. But, under §4208(b) until the 'affirmance' of the maximum term of imprisonment or its 'reduction' no definitive sentence has been imposed—there is no sentence." (R. 34)

ARGUMENT

A.

A Criminal Defendant Is Entitled To Be Represented by Counsel at Every Stage of the Criminal Proceeding

The question of a Defendant's right to be represented by counsel has been firmly established as a prerequisite to satisfy due process. In *Johnson v. Zerbst*, 304 U. S. 458 (1938), the Supreme Court held that under the Sixth Amendment a defendant must be provided with counsel to assist him in his defense (if he is unable to obtain counsel) and that a trial court's failure to safeguard a defendant's rights in this respect resulted in its loss of jurisdiction to proceed.

Walker v. Johnson, 312 U. S. 275 (1940);

Glasser v. United States, 315 U. S. 60 (1941);

Von Molthe v. Gillies, 332 U. S. 708 (1948);

all affirmed this right under the Sixth Amendment.

See also Rules 43 and 44 of Federal Rules of Criminal Procedure.

The right to be represented by counsel at the time of sentence, is also firmly established as a part of due process. In *Miller v. United States*, 185 F. (2d) 137 (5th Cir. 1950), the Defendant appeared at the time of sentencing with an attorney appointed to represent him on appeal. Then the appellate counsel did not undertake to assist the Defendant at the time of sentencing and the Defendant was required to represent himself. Accordingly the Court of Appeals reversed.

In *Ellis v. Ellison*, 239 F. (2d) 175 (5th Cir. 1956), the Court of Appeals ordered a state court defendant resentenced because his attorneys were not present at the time sentence was imposed.

In *Wilfong v. Johnson*, 156 F. (2d) 507 (9th Cir. 1946), the Court of Appeals ordered petitioner, an Alcatraz prisoner serving a twenty-five (25) year Federal bank robbery sentence, discharged from the sentence because it appeared that while associate trial counsel was in the court room he did not undertake to represent the defendant at the time of sentencing. The court states at pages 509-510:

> "• • • The mere presence in the court room as a spectator of an associate counsel who had helped represent the petitioner at the trial and who considered that his connection with the case had ended with the verdict, does not meet the guaranty of the Sixth Amendment of the Constitution • • •
>
> "We conclude that because of the failure of petitioner to be represented by counsel at the time of pronouncement of judgment and sentence he was deprived of a constitutional right and therefore the judgment and sentence (are) void."

In the instant case the respondent was not represented by counsel nor was he present when the final determination of his sentence was made. He had no opportunity to be advised of any further rights nor was he advised as to the meaning and effect of the final sentencing. Further, he was deprived of the right to present an argument either by himself or by counsel relating to the facts the District Court took into consideration in the final determination of his sentence.

Other leading cases enunciating the principal that a criminal defendant is entitled to be represented by counsel at sentencing are *Thomas v. Hunter*, 153 F. (2d) 834

(10th Cir. 1946) and *Gadsen v. United States*, 223 F. (2d) 627 (1955).

B.

A Criminal Defendant Is Entitled To Be Present in Court and Represented by Counsel at the Time the Final Sentence Is Imposed Under Title 18 U.S.C., Section 4208(b)

It is firmly established by the Fifth and Sixth Amendments to the Constitution of the United States of America under decisions of this Court and by Rules 43 and 44 of the Federal Rules of Criminal Procedure that a defendant has a right to be present and represented by counsel at every stage of the Criminal proceedings, and the sole question presented in this case is whether a reduction of sentence under §4208(b), Title 18 U.S.C., is a stage of the Criminal proceeding.

Section 4208(b), Title 18 U.S.C., is, as follows:

> "If the court desires more detailed information as a basis for determining *the sentence to be imposed*, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants times, not to exceed an additional three months, for further study. *After receiving such reports and recommendations, the court may in its discretion; (1) Place the prisoner on probation as authorized by section 3651 of this title: or (2) affirm the sentence if imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the*

offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section." (Emphasis added.)

This statute creates certain mandatory duties on the trial court. If the trial court desires to avail itself of this statute he must commit the defendant to the custody of the Attorney General for the maximum sentence permitted by law. He has no discretion as to the length of sentence at this stage of the proceedings. In other words, the Court at this stage cannot use its discretion in making the punishment fit the circumstances of the case. Additional mandatory duties are then prescribed.

There must be studies made of the defendant and reports and recommendations submitted by the Director of the Bureau of Prisons within three (3) months, which may be extended to six (6) months, then the trial court must perform certain mandatory functions. When the trial court receives the reports and recommendations, he must either:

1. Affirm the mandatory, original sentence, or
2. Reduce the mandatory, original sentence, or
3. Place the defendant on probation.

This statute, therefore, is clearly unlike the provisions of Rule 35 of the Federal Rules of Criminal Procedure. Rule 35 provides:

"The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari."

Under Rule 35 the Court has previously thought out the proper sentence to fit the circumstances of the case; used his discretion in fixing the penalty and then upon second thought may reduce it. This rule, unlike §4208(b), has no mandatory requirements for the trial court and a motion under the rule may be summarily denied. This is not true under §4208(b).

There being a fundamental distinction between §4208(b) and Rule 35 of the Federal Rules of Criminal Procedure we turn direct to the question of when the litigation has terminated.

Under the Federal Rules of Criminal Procedure the defendant is required to be present at every stage of the trial including the imposition of sentence. The defendant is also entitled to be represented by counsel at every stage of the proceedings. The Federal Rules of Criminal Procedure, Rules 43 and 44, so provide as follows:

> "Rule 43. Presence of the Defendant. The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. The defendant's presence is not required at a reduction of sentence under Rule 35."

"Rule 44. Assignment of Counsel. If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."

This court has held that litigation between the Government and a defendant is not terminated until there is nothing left to do but to execute the sentence. In *Parr v. United States*, 351 U. S. 513 (1956), this Court held:

"In general a 'judgment' or 'decision' is final for the purpose of appeal only 'when it terminates the litigation between the parties on the merits of the case, *and leaves nothing to be done but to enforce by execution what has been determined.' St. Louis I. M. & S. R. Co. v. Southern Express Co.*, 108 U. S. 24, 28, 27 L. Ed. 638, 639, 2 S. Ct. 6. This rule applies in criminal as well as civil cases. *Berman v. United States*, 302 U. S. 211, 212, 213, 82 L. Ed. 204, 205, 58 S. Ct. 164."

The trial judge at the time he invoked §4208(b) recognized that the litigation was not terminated between the defendant and the United States and that, in effect, a final judgment was not being rendered, stated:

"Well, it is the Judgment of this Court, based upon the (fol. 17p) Jury's finding of Guilty with regard to Count I of the indictment, that the Defendant is guilty as charged therein; and that the Defendant is hereby committed to the custody of the Attorney General or his authorized representative for a period of twenty years, and for a study as described in Title 18, United States Code, Section 4208(c), the results of such study to be furnished this Court within ninety days, or three months—Three months. Make it 'three months' instead of the 'ninety days.' It's more uniform. Within

three months. Whereupon the sentence of imprisonment herein imposed shall be subject to modification in accordance with Title 18, United States Code, Section 4208(b).

"Now in short, Mr. Behrens, what this means is that after there has been a staff evaluation made of your case—and I presume that you're pretty sick about hearing—or sick of hearing about 'staffs' and 'staff evaluations' and 'psychiatric evaluations,' but they have a purpose and they have a place. And we believe in them. Now there will be such an evaluation made in your case.

"And I think after about three months, when everybody (fol. 17q) has had an opportunity to reflect upon your case quite thoroughly, *that we should be able to come up with a sane and civil disposition of your case.*" (Emphasis added.) (R. 15-16)

The Court of Appeals in reversing the trial court also recognized that the litigation was not terminated at the time the trial court imposed the mandatory maximum sentence under §54208(b) when they analyzed *Parr v. United States*, 351 U. S. 513 (1956) in conjunction with Rules 43 and 44 of the Federal Rules of Criminal Procedure. In so analyzing the Court held:

"In *Parr v. United States*, 351 U. S. 513, 518, it was observed that the rule that in general, a judgment is final only when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined, applies in criminal as well as civil cases.

"In our opinion that rule is applicable here and fundamental requirements of due process made it essential that the petitioner be present at the time of such imposition of sentence, and that his right to have his counsel present be honored. Rule 43, Federal Rules of Criminal Procedure (18 U.S.C.A.) required the

presence of the defendant. Rule 44 recognizes his right to be represented by his counsel 'at every stage of the proceeding' in harmony with the guarantee of the Sixth Amendment. A sentencing, even to probation, is admittedly invalid in the defendant's absence. *Pollard v. United States*, 352 U. S. 354, 360. The Solicitor General in a memorandum submitted in *Grabina v. United States*, 369 U. S. 426, conceded that absence of a defendant at the time of sentencing was 'fundamental error' and under such circumstances 'there are basic infirmities in the sentence.' Cf. Ellis v. Ellison, 5 Cir., 239 F. 2d 175; Wilfong v. Johnston, 9 Cir., 156 F. 2d 507." (R. 33)

The logic of the holding in *Parr v. United States*, 351 U. S. 513, that the litigation is not terminated until there is nothing to be done but to enforce by execution what has been determined is clear when reviewed practically.

After a criminal defendant has been convicted, if he desires to appeal he must file his notice of appeal within ten (10) days. Under the rule the appeal must be docketed within forty (40) days from the filing of the notice of appeal or a total of fifty (50) days to perfect an appeal. If he was sentenced under §4208(b) the defendant, in effect, has perfected an appeal before he knows what his final sentence will be.

How does counsel advise his client? A defendant may have excellent ground to expect an Appellate Court to reverse a conviction, yet would be willing to forego an appeal and avoid the added expense of an appeal if he received probation. If he is sentenced under §4208(b) and the Government's position is accepted, he would have no alternative but to incur the expense, either on his own behalf or by proceeding in *forma pauperis* immediately. Subsequently action by the trial court may well result in dismissing the appeal after final sentence is determined. It is a well-

known fact that the length of sentence is a major factor and often the most important factor in a defendant deciding to take an appeal. He should not be required to take such action until he knows what the sentence will be.

A second practical reason for the holding that the litigation has not terminated until final sentencing is the defendant's right to allocution under Rule 32(a). The Government has attempted to show that Mr. Behrens refused his right to allocution at the time the mandatory commitment was made. The argument presented, however, misses completely the reasons for the existence of the right to allocution.

Once the trial court has decided to sentence the defendant under §4208(b) he need no longer concern himself with making the punishment fit the crime. Any plea for leniency made by either the defendant or his attorney is meaningless as the trial court at this time is powerless to do anything but to impose the maximum sentence under the law. The importance of the right to allocution is when the arguments of the defendant and his counsel are made to convince the Court to impose a light sentence. To be effective they can only be made when the trial judge can use his discretion to make the punishment fit the circumstances of the case.

In the instant case six (6) months elapsed between the time the mandatory sentence was imposed and the time the trial court finally determined the sentence. The trial court had conducted much business during this time and the defendant would of necessity become another name, another face or another file. Anything Mr. Behrens or any other defendant would have said six (6) months previously would be meaningless at this time. The trial judge cannot possibly have the "feel" of the case by merely reviewing

his trial notes and the reports contained in the file. He must for the first time seriously consider what punishment will fit the circumstances of the case and at this time the respondent was not present. A more important time to exercise the right of allocution cannot be imagined for it is only at this time that everything the respondent said would be meaningful.

CONCLUSION

It is, therefore, respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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